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In the Supreme Court of the United States

OCTOBER TERM, 1963

DION TYRONE DIAMOND,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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No. 979

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STATE OF LOUISIANA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Rule 19, Paragraph One, Subsection A of this Honorable Court's rules, states:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> > (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decision of this court."

For the reasons hereinafter given, it is felt that this is not an appropriate case in which a Writ of Certiorari should issue, for the reason that a Federal question is not at issue herein and for the additional reasons, hereinafter stated, assuming that such a question is at issue, this Court has decided such question in conformity with the decision of the Louisiana State Supreme Court.

For the reasons hereinafter to be given, Respondent does not feel that the question presented is correctly stated in Petitioner's brief.

REASONS FOR DENYING THE APPLICATION FOR WRIT OF CERTIORARI

The statement of the case as set forth in petitioner's brief to this Honorable Court is substantially correct and will be accepted for the purpose of this argument. Petitioner was charged by bill of information which averred that he unlawfully did violate LSA-R.S. 14:103 in that he, not a student of Southern University, did enter upon the premises of Southern University and there engaged in and encouraged students of Southern University to hold unruly, unauthorized demonstrations on the campus, and did lead and encourage said students to march through the University buildings while classes were being conducted, and did encourage said students to boycott and leave the classes in such manner as would foreseeably disturb and alarm the public.

LSA-R.S. 14:103 states:

"Disturbing the peace is the doing of any of the following in such manner as would foreseeably disturb or alarm the public:

(1) Engaging in a fistic encounter; or
(2) Using of any unnecessarily loud, offensive, or insulting language.
(3) Appearing in an intoxicated condition; or
(4) Engaging in any act in a violent and tumultuous manner by any three or more persons; or
(5) Holding of an unlawful assembly; or
(6) Interruption of any lawful assembly of people; or
(7) Commission of any other act in such a manner as to unreasonably disturb or alarm the public. . . ."

A mere reading of the bill of information against petitioner and of LSA-R.S. 14:103 will readily reveal that the bill of information factually and circumstantially charges this accused with the violation of sub-section six (6), which states:

"Interruption of any lawful assembly of people . . ."

A reading of the per curiam of the trial judge to bill of exception No. Seven, cited at Page 20 (a) of petitioner's brief to this Honorable Court, is as follows:

"The court overruled the motion for the reason that the State, in the opinion of the Court, had sustained its burden of proving the guilt of the defendant beyond a reasonable doubt. Reliable, competent evidence offered by the State showed that

> the defendant, a non-student, was present on the Campus of Southern University on the dates alleged in the bill of information, and while there, did in speeches made by him in meetings not authorized by those in charge of such matters, encourage and exhort Southern University students to boycott classes and to march into the classrooms while classes were in session and to disrupt the classes, even to the extent of pulling the students from the classrooms, in such a manner as would foreseeably disturb and alarm the public."

Petitioner states that the question presented to the trial court and presented to this court is:

> "Whether, where petitioner engaged in making speeches—and activity within the area of free expression protected by the Constitution—he was denied due process under the Fourteenth Amendment when punished under a state law containing general and indefinite prohibitions against disturbing the peace which are not narrowly drawn to define and prohibit specific conduct?"

A reading of the law involved, R.S. 14:103, the bill of information, the evidence in this case and the findings of the trial court, will readily reveal that this accused was charged with violation R.S. 14:103 (6), which states:

> "Disturbing the peace is the doing of any of the following in such a manner as would foreseeably disturb or alarm the public. . . .
>
> (6) Interruption of any lawful assembly of people. . . ."

Under LSA-R.S. 14:2 "foreseeably" is defined as follows:

> "Foreseeably refers to that which ordinarily would be anticipated by a human being of average reasonable intelligence and perception. . . ."

According to LSA-R.S. 14:24:

> "All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals."

The Louisiana Legislature, in common with the legislature of virtually every state, has sought to simplify its criminal law and procedure by abolishing the common law distinction between principals and accessories before the fact. The philosophy of such enactments is well-expressed by a statement of the Nebraska Court:

> ". . . If there ever was forceful reason for drawing a distinction between the procurer and doer, such reason has ceased to exist. Certainly, when one procures another to do a criminal act, such act is in effect the act of the procurer as well as that of the doer . . ." *Scharman v. State*, 115 Neb. 109, 112, 211 N.W. 613.

LSA-R.S. 14:24 merely sets forth that one who was an accessory before the criminal act at common law is now considered to be a principal. In the State of Louisiana, the accessory before the fact may be charged, prosecuted and convicted as a principal. *State v. Johnson*, 220 La. 170, 56 So. 2d 143.

Certainly no one would question that an assembly of students in a classroom receiving instructions dur-

ing school hours is not a lawful assembly of people, and likewise, no one would question the fact that a crowd of some one hundred persons going from one classroom building to another carrying signs and making noise, walking through classrooms, singing and stomping their feet in a very loud manner, would be anything but an interruption of said lawful assemblies of students in their classrooms. The foregoing is factually what occured as acknowledged by petitioner in his brief filed in this Honorable Court, at pages Eight and Nine. Petitioner was not charged with a criminal violation because he made speeches on the Southern University campus, nor was he convicted simply because he made speeches on the Southern University campus. Petitioner was convicted because he procured, encouraged, aided by direction and instruction these some one hundred students who actually marched through classes being conducted, causing a complete disruption of same. To grant petitioner immunity under the shield of the First Amendment, freedom of speech, under these circumstances, would be to grant immunity to the planner or plotter of any criminal activity. If any student were guilty on that occasion, of interrupting a class in session, a lawful assembly, this accused, by aiding directly or indirectly by his instructions, his counseling and having procured these students to disrupt these classes in session, although he, himself, did not actually disrupt the classes, is as guilty as they are. *LRS 14:23.*

LSA-R.S. 14:103, PARAGRAPH (6), IS NOT

VOID FOR VAGUENESS IN THAT SAID STATUTE IS SO VAGUE ON ITS FACE THAT ONE CAN NOT REASONABLY BE EXPECTED TO KNOW WHAT CONDUCT IS PROHIBITED WHICH COULD FORM THE BASIS FOR A CRIMINAL PROSECUTION AND SAID STATUTE IS NOT SO VAGUE IN ITS APPLICATION AS TO VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

The Louisiana Supreme Court, in the case of *State v. Bulot, et al; In re: Blaise, et al*, 175 La. 21, 142 So. 787, held that an act forbidding persons to unlawfully assemble for any unlawful purpose was not invalid as being so vague as to be violative of the constitutional requirement that every person shall be informed of the nature and cause of the accusation against him. They held that the word "unlawful" had a definite meaning in that it meant that which was not lawful, or that which was contrary to some express provision of law, and further held that the term "unlawful assembly for any unlawful purpose" meant to assemble for the purpose of doing some act or thing which the law prohibits. It would thus follow that the word "lawful" would, of course, correlatively be of sufficient conciseness so that a person of average, normal intelligence would understand it. Likewise, this Honorable Court in the case of *Chaplinsky v. State of New Hampshire*, 316 U.S. 568, held that Chapter 378,

Section 2 of the public laws of New Hampshire, which reads as follows:

> ". . . No person shall address any offensive, derisive or annoying word to any other person who is unlawfully in any street or other public place, nor call him by any offensive or derisive name, . . .",

was constitutional as against a contention of vagueness or generality, and in so holding held that the particular statute, punishing verbal acts was carefully drawn so as not to unduly impair liberty of expression, and not too vague for a criminal law. *Fox v. Washington*, 236 U.S. 273, 277; 35 S. Ct. 383, 384; 59 Law Ed. 573.

This Honorable Court in the case of *Irvin Feiner, Petitioner, v. The People of the State of New York*, 350 U.S. 268, at page 335 of the Court's decision, held the New York Penal Law, Paragraph 722, which provides as follows:

> "Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:
>
> (1). . . .
>
> (2) Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others. . . ."

valid, as against the contention of generality and violative of the First Amendment to the Federal Constitution and the Fourteenth Amendment.

REASONS FOR DENYING WRIT OF CERTIORARI

Petitioner was not arrested, charged, tried and convicted for making a speech on the Southern University Campus. As stated in the bill of information, he was charged with having entered upon the premises of Southern University and there engaged in and encouraged students of Southern University to hold unruly, unauthorized demonstrations on the campus, and did lead and encourage said students to march through the University buildings while classes were being conducted, and did encourage said students to boycott and leave the classes, in such manner as would foreseeably alarm and disturb the public. The fact that petitioner was permitted to make several speeches from January 30, 1962, through January 31, 1962, without being arrested, would belie the alleged assertion and contention that he was arrested for making these speeches. Not until some of his audience actually marched through classrooms in session in a noisy manner, interrupting said classes, was this accused arrested and charged with this offense.

It is, therefore, respectfully submitted that the numerous cases cited by petitioner in support of protection under the First and Fourteenth Amendments are inappropriate.

This is not a case wherein petitioner was arrested and prosecuted because local police officers were honestly concerned with preventing a further breach of the peace. As a matter of fact, petitioner was arrested after the breach of the peace had been com-

mitted. It is not a constitutional principle that in order to preserve order the police must proceed against the crowd, whatever its size and temper, and not against the speaker. It is true that breach of peace statutes, like most tools of government, may be misused. Enforcement of these statutes calls for public tolerance and intelligent police administration. These, in the long run, must give substance to whatever this Court may say about free speech. But the possible misuse of a statute is not alone a sufficient reason to deny the State of Louisiana the power herein asserted, or so limit it by Constitutional construction as to deny its practical exercise. The power effectively to preserve order can not be displaced by giving a speaker complete immunity.

Petitioner further urges that this accused was charged, tried and found guilty of violating LSA-R.S. 14:103 (a), Subsection (7), which states:

> "Disturbing the peace is the doing of any of the following in such manner as would foreseeably disturb or alarm the public:
>
> (7) Commission of any other act in such a manner as to unreasonably disturb or alarm the public. . . ."

It is contended by petitioner that because of the vague and general language utilized in said subsection, that it is violative of the constitutional rights of petitioner. It is further contended by petitioner that if any of the seven subsections listed under R.S. 14:103 are unconstitutional, and if a conviction were sustained upon the general law wherein one particular

part of said law is unconstitutional, that the Court, not knowing that the conviction rests upon the unconstitutional part of said law, should sustain petitioner's contention. *Stromberg v. California*, 283 U.S. 359-368. The statute involved in the Stromberg case, being Section 403 (a) of the Penal Code of California, provides:

> "Any person who displays a red flag, banner, or badge or any flag, badge, banner, or device of any color or form whatever in any public place or in any meeting place or public assembly, or from or on any house, building, or window as a sign, symbol or emblem of opposition to organized government or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character is guilty of a felony."

This honorable Court found a portion of said statute to be violative of the Constitutional rights of Stromberg, and since the verdict of the jury was based upon an indictment which tracked the whole statute, and because it was not known whether or not Stromberg was convicted under the unconstitutional part of said statute or not, this Honorable Court remanded the case for further proceedings, not inconsistent with the opinion therein. A reading of the bill of information herein, the judge's per curiam overruling the motion for a directed verdict and the evidence contained in the record will readily reveal that LSA-R.S. 14:103 (7) was not involved, and therefore the Stromberg case, assuming the invalidity of subsection (7) of LSA-R.S. 14:103, is not involved. This Honorable Court in

the case of *Chaplinsky v. State of New Hampshire*, 315 U.S. 769, recognized the rule of law that where a statute has several provisions which are severable, assuming that one provision be unconstitutional, the other, if constitutional and severable, could be sustained. The Court in that particular case accepted the construction of severability and limited to consideration the constitutionality of the statute under consideration in sustaining petitioner's conviction.

CONCLUSION

It is respectfully submitted that this case does not involve an unconstitutional infringement by the local authorities or by the State of Louisiana of the First and Fourteenth Amendments. That this accused was not arrested, tried and convicted for making a speech. That he was charged, tried and convicted for encouraging, leading, aiding and abetting others in obstructing classes in session which was, in effect, the interruption of a lawful assembly of people as set forth under LRS 14:103 (6). That being the aider, abetter, leader and procurer, under the laws of the State of Louisiana, and particularly R.S. 14:24, he is a principal, and as such is as guilty as the doer of the unlawful act. Should this Honorable Court find that this matter is within the realm of the First and Fourteenth Amendments of the United States Constitution, it is submitted that the case of *Irving Feiner, Petitioner v. The People of the State of New York*, 340 U.S. 268, is appropriate and should govern this Court in denying petitioner's application for writs of certiorari. Alter-

natively, should this Honorable Court hold that LSA-R.S. 14:103 in any of its particular sections or subsections to be unconstitutional, it is urged that this Court accept the construction of severability and limit its consideration to the particular subsection which is here involved as shown by the factual and circumstantial averments of the information, and hold R.S. 14:-103, Subsection (6), as being controlling and as being constitutional as against any contention of vagueness. *Chaplinsky v. State of New Hampshire*, 315 U.S. 769.

Respectfully submitted,

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PROOF OF SERVICE

I, Sargent Pitcher, Jr., one of the Attorneys for the State of Louisiana, respondent herein, certify that on the ..... day of April, 1963, I served copies of the foregoing brief of the State of Louisiana in Opposition to Application for Writs of Certiorari to the Louisiana Supreme Court, by mailing the required number of copies, postage prepaid, to Counsel of Record for Petitioners, at the following address:

Jack Greenburg, James M. Nabrit, III, 10 Columbus Circle, New York 19, New York, and Johnnie A. Jones, 530 South 13th Street, Baton Rouge 2, Louisiana.

Sargent Pitcher, Jr., Counsel of Record for the Respondent

Sworn to and subscribed before me, the undersigned Notary Public, within and for the Parish of East Baton Rouge, State of Louisiana, this ..... day of April, 1963.

Notary Public